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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 984

EDGAR C. GUTHARD, ACTIVATED SLUDGE, LIMITED, and ACTIVATED SLUDGE, INC.,
Plaintiffs-Respondents,

vs.

THE SANITARY DISTRICT OF CHICAGO,
Defendant-Petitioner.

REPLY BRIEF OF PETITIONER, SANITARY DISTRICT OF CHICAGO.

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This reply brief is confined to an answer to the four principal propositions of respondents' brief in opposition to petitioner's petition for a writ of certiorari.

I.

The determination of the questions raised by the petition for a writ of certiorari depends solely upon the legal sufficiency of the Petition sought to be filed below—not upon any disputed facts.

The questions raised in this petition for certiorari relate solely to the right to take evidence to support the allegations of the Petition sought to be filed below, as no

answer or other form of responsive pleading was filed by respondents and no evidence was heard by the District Court.

The District Court stated that the issue presented was the same "as if the petition had been filed and its sufficiency were attacked by motion to strike or dismiss" (R. II—885). The only material defense was based purely upon questions of law with respect to the sufficiency of the Petition. Under these circumstances no dispute of fact could arise. The petitioner argued in the courts below, and now urges, that it is entitled to its day in court, that the Petition should be allowed to be filed and that petitioner should be allowed to take evidence to prove and substantiate the allegations therein made.

The appeal to the Court of Appeals was solely on the issue whether the decree of the District Court denying leave to file the Petition should be reversed.

II.

Petitioner's principal right to relief is grounded upon recently discovered uncontroverted and undeniable acts of suppression and concealment of evidence.

There cannot be any dispute concerning the respondents' acts of suppression and concealment of evidence alleged in the Petition sought to be filed and they are sufficient to justify this Court in granting the relief here sought. The lower courts have not made findings contrary to those ultimate uncontroverted facts and the only issue relates to the legal conclusions drawn by the lower courts from such undisputed facts.

Confining ourselves to those ultimate facts alleged in the Petition sought to be filed on which we base our charge that respondents have been guilty of sullied conduct in

suppressing and concealing evidence, we enumerate some of the facts which have never been and cannot be controverted:

(a) Albert W. Dilling, former Chief Engineer of the Sanitary District of Chicago, shortly after he left petitioner's employment and unbeknown to petitioner, went to England and made an agreement with Activated Sludge, Ltd., then owners of the patents in suit, for the exploitation of the patents in the four states of Illinois, Wisconsin, Indiana and Michigan (R. I—8, 80-81).

(b) Dilling procured as his co-adventurers and associated with him, McCaleb, Guthard and Mayo, and they made an agreement dated May 29, 1924, under which it was agreed that any interest acquired by Guthard in the patents would be held by him as trustee for the four men and this agreement was suppressed by respondents and not discovered by petitioner until lately (R. I—10).

(c) The co-adventurers arranged to have the so-called license agreement of June 23, 1924, run to Guthard as an individual. Dilling's relation to the enterprise was thereby concealed by suppressing Guthard's trust capacity, which we lately discovered (R. I—11).

(d) In the companion agreement of June 23, 1924, Guthard acknowledged that he held the license agreement *as trustee* for himself, Mayo and McCaleb, but this agreement was suppressed by respondents and not discovered by petitioner until lately (R. I—14).

(e) In furtherance of their enterprise, Dilling, McCaleb, Guthard and Mayo entered into a trust agreement dated July 25, 1924, under which they conveyed all their interest in the patents to a Massachusetts trust, Activated Sludge Processes of America, and this agreement was also suppressed by respondents and not discovered by petitioner until lately (R. I—14, 47).

(f) On August 9, 1924, McCaleb wrote Activated Sludge, Ltd. that Mr. Day, then attorney for petitioner, was in England and that if he should communicate with them, Mr. Day should not be given "any inkling that Mr. Dilling is in any way connected with or interested in the matter of establishing your patents in this country." This was not known to petitioner until lately (R. I—16; Petition for a Writ of Certiorari, pp. 7-8).

(g) On August 19, 1924, respondents' counsel stated in their formal notice of infringement to petitioner that Guthard was possessed of an exclusive license under the patents in suit whereas, in fact, the patent rights were possessed by Activated Sludge Processes of America, a Massachusetts trust, in which Dilling had a one-fourth interest (R. I—16-18).

(h) Both the original and supplemental bills of complaint pleaded a false chain of title by failing to allege the assignment of the patent rights to the Massachusetts trust, Activated Sludge Processes of America (R. I—18, 19-20). By showing Guthard as an individual instead of as trustee, Dilling and his associates hoped to, as they did, prevent the discovery of Dilling in connection with the enterprise and thereby succeeded in suppressing and concealing the lately discovered evidence of Dilling's relation to and instigation of the enterprise against petitioner.

(i) The purported cancellation of the license agreement by Guthard was signed by him as an individual instead of as trustee (R. I—21).

(j) Mayo testified in the patent phase of this case that he was general manager of the association relating to the license agreement; that he had a one-third interest; and that there were only three members of the association, himself, Guthard and Mayo, and no one else (R. II—858-9). This concealed the fourth member of the association,

Dilling. The falsity of this testimony was only lately discovered by petitioner (R. I—24-33).

(k) Mayo testified in the patent phase of this case that Activated Sludge Processes of America was not a trust but merely the name under which Guthard operated and that he knew nothing more about it (R. II—873-4). The recently discovered evidence reveals that Activated Sludge Processes of America purported to be a formal Massachusetts trust and that Mayo, Dilling, McCaleb and Guthard signed it (R. I—47).

(l) Mayo testified in the patent phase of this case that Activated Sludge Processes of America was merely an understanding under which his interest was protected and that he did not recall whether or not that understanding was in writing (R. II—874).

(m) Guthard testified in the patent phase of this case that the three owners of the agreement were himself, McCaleb and Mayo, and that it was oral and only a gentlemen's three-party agreement (R. II—877). Petitioner recently discovered that Mayo and Guthard admitted in the Dilling suit that they had testified falsely in the patent phase of this suit (R. I—31-33).

(n) The statement by respondents' counsel in the Milwaukee case that he had produced the assignments giving title (R. II—554). The recently discovered evidence reveals for the first time the suppressed assignment to Activated Sludge Processes of America (R. I—14-15, 48).

(o) The action of respondents' counsel in March, 1938, in the Milwaukee case in misquoting to the Circuit Court of Appeals a document not in the record but recently discovered, being one of the documents concealed, thereby suppressing the relationship of Activated Sludge Processes of America and Dilling to the patents in suit (R. I—109-11).

(p) The action of respondents in having a consent order, most unusual in its terms, entered in the Dilling case ordering the Master's draft report suppressed and all copies thereof destroyed, and under which order all documents, exhibits and transcript of testimony were returned to the respective parties, with the result that to this day petitioner has been unable to obtain any copy of the Master's draft report and does not have access to the transcript of testimony taken in the Dilling case (R. I—33).

Neither the respondents nor the lower courts have denied that any of the foregoing facts occurred. The only dispute is as to the legal significance of such facts. In failing to apply to the undisputed facts the ethical standards established by this Court in *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, the decisions of the lower courts are in direct conflict with that decision.

III.

The Record before this Court, contrary to respondents' statements, is the entire record in this proceeding.

The Record before this Court is the same record, with the addition of the subsequent proceedings in the Court of Appeals, which was used before the Court of Appeals. Both parties filed written designation of the record (R. II—908-15) and everything called for by petitioner and respondents appears in the printed transcript certified to this Court.

IV.

The affirmance by the Court of Appeals on the erroneous premise that the District Court had heard voluminous evidence cannot be explained away by such casual argument as is contained in respondents' brief.

The short opinion of the Court of Appeals is copied into the Record at page 920. There the Court of Appeals said:

> "On January 20, 1940, this court, on defendant's petition in the original cause, granted permission for defendant to petition the District Court for leave to file the petition here involved. The District Court after hearing voluminous evidence denied leave to file such petition, and from that order this appeal is prosecuted."

The District Court did not hear voluminous evidence as erroneously stated by the Court of Appeals. As a matter of fact, the District Court heard no evidence whatsoever. On pages 19 and 20 respondents attempt to distort the above language of the Court of Appeals and while admitting that no testimony was heard in the District Court, contend that the Court of Appeals must have been referring to the thousands of pages of testimony previously taken in other phases of the case. The fact remains that the Court of Appeals erroneously concluded that voluminous evidence had been heard in the District Court and that it would not go back of the District Court's findings thereon.

Despite respondents' statements to the contrary (pp. 9 and 12), the subject matter of this petition for a writ of certiorari, relating to matters suppressed by respondents

and only recently discovered by petitioner, could not have been and were never before presented to this Court. The other petition for a writ of certiorari filed in this case in 1937, and the petition filed in the Milwaukee case in 1934, related exclusively to the validity of the patents in suit and their infringements by the plants constructed by the defendants in such cases.

The high standards of ethics announced and applied by this Court in the *Keystone Driller Co.* case are so salutary and in keeping with the modern trend of judicial pronouncements that they should be given effect and be made to apply as well to litigants in the Seventh Circuit as in the Sixth and other Circuits.

Respectfully submitted,

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